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SUPREME COURT OF THE UNITED STATES.

Nos. 24 and 25. — OCTOBER TERM, 1944.

VICTOR J. HERB,
Petitioner,
24 vs.
NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for WABASH RAILWAY COMPANY,
Respondents.

BENJAMIN F. BELCHER,
Petitioner,
25 vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

On Writs of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENTS' PETITION FOR REHEARING.

J. A. McCLAIN, JR.,
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LOUISVILLE & NASHVILLE RAILROAD COMPANY, Respondent.		

RESPONDENTS' PETITION FOR REHEARING.

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, respondents in cause No. 24, above described, by J. A. McClain, Jr., J. H. Miller, George D. Burroughs and Bruce A. Campbell, their attorneys; and Louisville & Nashville Railroad Company, respondent in cause No. 25, above described, by Harold Baltz, Walton Whitwell and Bruce A. Campbell, its attorneys, and respectfully move this honorable Court, as provided by Rule 33 of this Court, to enter an order

granting to these respondents a rehearing in said consolidated causes, in which the final opinion of this Court was rendered on April 23, 1945.

And in support of this motion respondents most respectfully urge and state that this Court in its said opinion has overlooked and misapprehended points of law material and pertinent to a proper decision in these consolidated cases, in the manner and respects hereinafter more specifically set forth.

I.

The Court has overlooked or misapprehended rules of law, material and pertinent to a proper decision of these consolidated cases.

A. In its opinion, this Court, in commenting upon the announcement of the Illinois Court, in response to petitioners' request for a clarification of the grounds upon which it intended to rest its judgment, said:

> "That court, responding to petitioners' request, has made clear that its judgment resulted solely from its interpretation of a federal statute of limitations applicable to actions under the Federal Employers' Liability Act which provided: 'No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.'"

It is respectfully submitted that in its holdings the Illinois Court did not pass upon a federal question decisive of the case but that the decision of the Illinois Court rests upon a non-federal ground which independently and adequately supports the state court's judgment, and that consequently this Court has no jurisdiction of these causes. In fact the Illinois Court stated, that, under Illinois practice, while the trial courts' certificates that federal ques-

tions and state constitutional questions were involved, gave it jurisdiction of the cases upon direct appeal, yet it had not passed upon these questions.

The Illinois Court further said in its announcement that it passed upon the question of whether or not suits were commenced in the state courts solely as a state question, and that after holding that under state practice no suits were ever commenced in the city courts it merely applied the two years statute prescribed by the Act. The only federal question that could possibly be involved was the two years statute, and that was not a law question, but was merely a matter of mathematical computation of time.

Even though the word "commenced" is used in Sec. 6 of the Act, yet that does not permit this Court to determine as a federal question when or whether a suit was commenced in a state court. That is wholly a matter of state law. When petitioners, as plaintiffs, chose their forums in the state courts, they were bound by the state rules of practice, procedure and jurisdiction applicable to those courts by state law, and neither this Court nor the Congress has the power or authority to regulate in the state courts any of these matters.

In our original brief, pages 23 to 41, and in our oral argument before this Court, we thought we had covered this question fully and completely; and we again ask this Court to consider the rules laid down by the decisions then cited, most of which are cited in the opinion of this Court of February 5, 1945, under the point labeled "First" in that opinion. We particularly call attention to the quotation in the opinion of February 5, 1945, from the Mondou case, 223 U. S. 1, l. c. 56-57, which this Court quoted approvingly to the effect that under the Act **Congress did not attempt to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure,** but only made it the duty of a state court to take juris-

diction when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, and when the action is susceptible of adjudication according to the prevailing rules of procedure. (Emphasis supplied.)

Further, we call attention to the quotation in the opinion of February 5, 1945, from the Douglas case, 279 U. S. 377, l. c. 387-388.

Furthermore, the case of Goldenburg v. Murphy, 108 U. S. 162, is exactly in point on this question. It is cited and commented upon on page 30 of our original brief. This Court, in neither of its opinions, has commented on this case or the other cited cases, and although the last opinion impliedly overruled it, it is not mentioned, distinguished or expressly overruled in the opinion. The present opinion of this Court is in direct conflict with its decision in the Goldenburg case, to the effect that even though one is suing on a federal right of action in a state court and under a limitation prescribed by federal statute as to when suit shall be commenced or brought, yet the state court, as a matter of state law, is the sole judge of when the suit was commenced or brought and its decision on that question presents wholly and entirely a state question and not a federal one.

It is interesting to note that in a recent decision of the Circuit Court of Appeals of the 10th Circuit, in the case of Isaacks v. Jeffers, 144 F. (2d) 26, l. c. 28, that Court so construed the Goldenburg case, and this Court denied certiorari on December 4, 1944, 65 S. Ct. 270.

When petitioners selected the state courts as forums for their controversies, they accepted the rules of state practice relative to when or whether a suit was commenced. The question of when a suit is commenced in a state court cannot be a federal question merely because the word "commenced" is used in a federal statute. The

Illinois Court has held that no suits were ever pending in the city courts under state practice. The state court is the sole arbiter of that question, and its determination is not a federal question, does not involve the construction of a federal statute and is merely a matter of practice and procedure in the state courts which those courts alone control.

We again call the Court's attention to the cases of John v. Paullin, 231 U. S. 383; C. & O. Ry. v. DeAtley, 241 U. S. 310, and L. & N. R. R. Co. v. Holloway, Admr., 246 U. S. 524, cited and discussed on page 31 of our original brief on this point, and also the decisions cited but not discussed to the same effect appearing on page 32 of our original brief.

B. To declare or enforce any other rule on the part of this Court would be judicial legislation on its part and the establishment of a rule in Federal Employers' Liability cases which would not apply to other cases in the state courts, and would be an interference with the right of the State to prescribe its own rules of practice and procedure, free from interference by federal legislation and decisions where such practice and procedure was not in contravention of any provision of the Constitution of the United States. In other words, if the decision in the instant case stands, there will be one rule in Illinois in Federal Employers' Liability cases and another rule in all other cases relative to when a suit is commenced or whether or not commenced at all in a court having absolutely no jurisdiction of the subject matter. For example, a railroad employe engaged and injured in interstate commerce might file papers in a court having no jurisdiction, or possibly with the Board of Supervisors, and he would have commenced a suit; but a person injured in a crossing accident and suing a railroad to recover damages would not

have commenced a suit by filing it in a court having no jurisdiction of the subject matter. Such a rule, we submit, would produce confusion, prescribe different rules of practice and procedure in state courts in cases of similar character, would deny to a state the right to determine such matters for itself, and would not be within the power, jurisdiction and authority of this Court to so require. In fact the General Assembly of Illinois could not make such a distinction because Sec. 22 of Art. IV of the Illinois Constitution (Ill. Rev. Stat., p. 22) prohibits it from passing any local or special law "regulating the practice in courts of justice." This decision therefore legislates on a matter of Illinois practice in a way that even its own General Assembly could not do.

C. In the opinion of April 23, 1945, this Court said:

> "An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try, and otherwise determine that cause."

In its announcement the Illinois Court states that it had held that the trial courts could have had no jurisdiction under any circumstances until the purported transfer to the circuit courts, and that even then the orders of the circuit courts, if otherwise valid, did not and would not have the effect of causing the time of commencement to relate back to the date of filing the cause in the city courts. Even this statement was made with the assumption, but without deciding, that the venue statute was applicable and constitutional. This is wholly a state question. Each respondent filed a special appearance in the circuit courts;

they have never generally appeared in such courts. Concededly, the statute had expired when the papers were filed in the circuit courts.

While the Illinois Court declined to pass upon the applicability or constitutionality of the venue statute, yet it did hold conclusively that even if that statute was applicable and constitutional, yet under state practice there would be no suit commenced until the papers were filed in the circuit courts and that the time of commencement would not relate back to the filing of the papers in the city courts. The Illinois Court further held in its original opinions that the summonses were void, that the service was void, that respondents could have disregarded the summonses and service and let default go against them, that any judgments rendered thereon would be void, that no executions could be issued thereon and that even a general appearance and participation in trials and appeals did not make any cases pending in the city courts. In other words, on the question of jurisdiction of the city courts, which this Court concedes is a state question, so far as commencing a suit is concerned, these cases might just as well have been filed with the Board of Supervisors of the county or a City Council of some city in the State of Illinois. This is true because under Illinois law these cases were filed in courts that were not even courts, so far as these cases were concerned, because they had no jurisdiction of the subject matter of the suits. This Court, in its opinions, has not passed upon this question but has overlooked that part of the Illinois Court's opinions relating to this phase of the case.

D. The opinion in this case clearly changes the rule of law that has been established by this Court and adhered to for more than a century. It overlooks, without directly overruling, its own cases to the contrary; and it establishes

the precedent, heretofore unheard of in judicial annals, that this Court may prescribe, merely because a federal statute is involved, matters of practice and procedure in the state courts. Such a decision is contrary to previous conception of the nature and separation of powers between the federal government and the states, and is an exercise of federal authority on matters which have always been and always should be, in the absence of constitutional inhibitions, left exclusively to the control of the states themselves.

The whole basis of this Court's opinion is that because the Federal Act used the word "commenced" this Court has the full right and authority to define that word when an action is attempted to be commenced in a state court, even though that construction is entirely different from the state court's construction applicable to all other cases. This Court further predicates its opinion upon the hypothesis that this is a decision upon a federal question. If this construction is correct, then whenever a federal statute of any kind is the basis of a state court action this Court may by review regulate all matters of practice and procedure in the state court in such a case. Such a practice, in our opinion, is not, and cannot be the law, and yet this opinion lays the foundation for entire assumption by this Court of such matters in state courts when any federal question is involved, whether or not such federal question is decisive of the case. It overrules all existing precedents and establishes a dangerous precedent for the future.

II.

Conclusion.

Rule 33 of this Court prevents us from further amplifying our views on the questions involved in this petition. With all due respect to the Court, and in the most respectful manner, we urge this motion. We ask that our petition

for rehearing be granted, that the causes be again heard and considered by this Court, and upon such further hearing and reconsideration that the judgments of the Illinois Supreme Court may be affirmed.

All of which is respectfully submitted.

J. A. McCLAIN, JR.,
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WALTON WHITWELL,
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Attorneys for Respondent
in No. 25.

Certificate of Counsel.*

We, the undersigned, counsel for the respective respondents in the above consolidated causes, do hereby certify that Respondents' Petition for Rehearing filed herewith is filed and presented in good faith and not for delay.

J. A. McClain, Jr.,
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* The above and foregoing is a true, correct and exact copy (exclusive of caption) of a duly executed original certificate of counsel filed with the foregoing Petition for Rehearing.